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Supreme Court of the United States

OCTOBER TERM, 1974

74-6137

UNITED STATES OF AMERICA ex rel. CARL ROBINSON,

Petitioner,

against

LEON J. VINCENT, Superintendent, Green Haven Correctional Facility,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITIONER'S APPLICATION FOR WRIT OF CERTIORARI

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Opinion Below

The Opinion of the Court of Appeals, reported at 506 F. 2d 923 (1974), is set forth in the appendix attached to petitioner's papers. The Court affirmed a finding made by the United States District Court for the Southern District of New York (COOPER, J.), following an extensive evidentiary hearing, that there was clear and convincing evidence of an independent, untainted source for an in-court witness identification of petitioner. (The District Court decision is reported at 371 F. Supp. 409 [1974] and is also appended to petitioner's papers.)

The District Court's findings and prior hearing had been mandated by the Court of Appeals during its previous consideration of this case *sub nom. U. S. ex rel. Robinson* v. *Zelker,* 468 F. 2d 159 (2d Cir. 1972), cert. den. 411 U.S. 939 (1973).

Jurisdiction

Petitioner seeks to invoke the jurisdiction of this Court under 28 U.S.C. §1254(1).

Questions Presented

1. Does petitioner's allegation that the District Court has applied an incorrect legal standard raise a viable claim within the meaning of *U.S.* v. *Wade*, 388 U.S. 218 (1967) and *Stovall* v. *Deno*, 388 U.S. 239 (1967)?

2. Is petitioner's claim regarding the inadmissibility of testimony relating to pretrial identification (a) properly before this Court; (b) in any event, of constitutional significance?

A. The Crime.

The events of the crime and petitioner's subsequent apprehension by the police are substantially uncontroverted.

At approximately 11:30 A.M. on the morning of May 3, 1968, Daniel Greenberg, the operator of a parking lot at 309 W. 46th Street (between Eighth and Ninth Avenues) was returning to the lot carrying change he had just obtained from a bank in a blue airline bag. While walking on the south side of 46th Street, approximately 50 feet after turning the corner from the west side of Eighth Avenue, he was shot in the back and his bag was grabbed from him by a young, Negro assailant in his twenties, who was later identified as Robinson.*

The crime was witnessed by two passersbys, Joseph Barcello and Juergen Schumann, and by Patrolman Ferdinand Voltaggio, assigned to the Parking Enforcement Squad, who was driving a police tow truck and was stopped

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* We have appended to this brief a diagram illustrating the events of the crime. This diagram is merely a copy of an exhibit submitted in the District Court.

for a traffic light at the southwest corner of Eighth Avenue. Their separate accounts at trial indicate that the following sequence of events happened.

Robinson (he was identified by Voltaggio) ran across 46th Street to the north corner, at which point he was some 25 feet from Voltaggio. He then ran across Eighth Avenue and jumped into the front right side of a white Mercury Cougar which was double parked on the northeast corner of Eighth Avenue with two other men in it.

Voltaggio gave chase in his tow truck and several blocks later, at 48th Street and Sixth Avenue—when Voltaggio was approximately 35 feet from the white Mercury—both cars became stuck in traffic. At this point Voltaggio observed Robinson jump from the car and flee. However, he was able to apprehend the other two occupants of the car, Walter and Charles Pyles. In the car he found a blue airline bag with the change Greenberg had obtained from the bank, a box of .22 caliber shells, and a Hertz car rental agreement for the car, made out to Carl M. Robinson, and listing his address as 40 Martin Place, Port Chester, New York.

Following the stopping of the getaway car, Voltaggio brought the Pyles brothers to the 18th Precinct where they were booked by Detective Matthew Horan. Voltaggio furnished Horan with a copy of the Hertz agreement and provided him with the following description of Robinson: "unknown male, negro, 25 years old, 5'7", 150 lbs., brown complexion, dark shirt and jacket, dark pants". The description was then transmitted on police teletype as an alarm for petitioner's arrest.*

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* The description is the first of several made by Voltgaggio. Another was made at the arrest warrant hearing on the evening of the crime, another at Robinson's trial some 21 months later, and still another at the federal evidentiary hearing. Despite petitioner's strenuous assertions to the contrary (Petition p. 6), it is clear that these descriptions are all virtually identical: petitioner is described throughout as approximately 5'7", 135-150 pounds, 23-25 years old, wearing a dark shirt and jacket.

That evening, following testimony by Detective Horan as to the car rental agreement and virtually identical descriptions of Robinson by his girl friend and later wife, Odessa Chambers, and by Voltaggio, Judge Bloom of the Manhattan Criminal Court issued a warrant for Robinson's arrest.

Later that night Detective Horan went up to Port Chester and, after failing to find Robinson at his home, arrested him at the house of Odessa Chambers.

B. The Allegedly Tainted Identification Procedure.

Petitioner asserts that there were three, separate, identification procedures employed by the police between the time of the crime and the trial that irreparably tainted the at-trial identification by Voltaggio.

The first of these occurred at the arrest hearing. Voltaggio had an opportunity to listen to a description of petitioner by Odessa Chambers before furnishing his own description.

The second involved a one-man showup in the squad room of a police station on the night of Robinson's arrest. There, in the presence of another detective, Voltaggio positively identified Robinson as the perpetrator.

The third taint involved the showing of two pictures of Robinson to Voltaggio at some time after the stationhouse showup.

Reasons Why Certiorari Should be Denied

Contrary to petitioner's assertions, the decision below fails to set forth any substantial constitutional questions within the meaning of *U.S.* v. *Wade*, 388 U.S. 218 (1967) and *Stovall* v. *Deno*, 388 U.S. 239 (1967).

A. The Underlying Issue Presented Herein.

Despite petitioner's attempts to disguise the thrust of his arguments, it is clear that his petition can be telescoped in terms of one basic factual issue—an issue that had been carefully framed by the Circuit Court in ordering the remand (468 F. 2d at 163):

> "The principal question . . . is whether officer Voltaggio's identification had an independent source."

Since this question has been answered in the affirmative following an extensive hearing by the District Court and since that finding was held by the Circuit Court not to be "clearly erroneous" on either the law or the facts [see 28 U.S.C. Federal Rules of Civil Procedure, Rule 52(a)], it is clear that there are no issues of merit before this Court. Indeed, petitioner is in effect seeking to have this Court credit his own self-serving version of the credibility of witness testimony over the thorough and sound determination of the District Court. This is plainly not the function of certiorari.

B. There is an Independent Basis for Voltaggio's Identification.

As this Court has already emphasized in previous opinions, in a situation such as the present one, involving a post-arrest confrontation between an eyewitness and the accused without the presence of counsel, there must be "clear and convincing evidence" of an alternative source for the eyewitness identification. *U. S.* v. *Wade*, 388 U.S.

240, 218 (1967). The record below makes it clear that such evidence does exist.

Following well-established doctrine, the District Court focused essentially on "the opportunity of the witness to view the criminal at the time of the crime", *Neil* v. *Biggers*, 409 U.S. 188, 199 (1972); see also, *U. S. ex rel. Phillips* v. *Follette*, 428 F. 2d 912, 915 (2d Cir. 1970) *cert den.* 400 U.S. 908 (1970), noting that "much will depend on the witness' initial opportunity for observation and also on whether he was motivated to make a careful observation of the perpetrator". Although Judge Cooper found that Voltaggio had no more than seven to ten seconds to observe the robbery from the time Robinson was standing over Greenberg's body till the time he entered the car and perhaps two to three more seconds to observe Robinson when he fled from the car, "in the context of this case it was sufficient" (371 F. Supp. at 412, 417). The reasoning behind this conclusion was summarized by the court as follows:

> "The visibility conditions were excellent and during that period petitioner came within 25 feet of Voltaggio. Moreover, Voltaggio was able to observe petitioner again as he jumped from the Cougar and fled up Sixth Avenue. On this occasion, Voltaggio was only 30 to 40 feet from petitioner as he emerged from the Cougar . . . a distance sufficiently short to enable Voltaggio to scrutinize once again the assailant's features and confirm in his mind the mental image developed seconds before at their confrontation at 46th Street and 8th Avenue. Though of itself this later opportunity for observation—it could have taken no more than '2 or 3 seconds' . . . would hardly have been an adequate independent source, it afforded Voltaggio an opportunity to confirm or bolster his image of the assailant developed seconds before at 46th Street and 8th Avenue." (371 F. Supp. at 417)

Judge Cooper also noted that Voltaggio was clearly motivated to make an accurate observation:

> "Moreover, Voltaggio was a trained police officer who upon observing the commission of a crime immediately concentrated his efforts upon apprehending the assailant and his accomplices. This must undoubtedly have included focusing upon the assailant's features for the purpose of making a subsequent identification. We therefore give greater weight to Voltaggio's testimony than we would were he an ordinary bystander or a victim of a crime." (371 F. Supp. at 418)

The court went on to conclude that

> "The Government produced clear and convincing evidence of a source for the in-court identification arising independently of the illegal confrontation." (371 F. Supp. at 418)

This finding is certainly well within the legitimate discretion of the trial court, as a finder of fact. Cf. *LaVallee* v. *Delle Rose,* 410 U.S. 690 (1973).

C. The District Court Did Not Fail to Apply A Proper Standard of Proof.

Petitioner asserts that the District Court did not utilize the clear and convincing evidence standard of the *Wade* case (*Wade,* 388 U.S. at 240) in measuring the separate and cumulative effect of the taints on the evidence of the independent source viewing. Instead, petitioner argues, the District Court viewed the taints only in terms of themselves—that is, by the pre-*Wade* standard of whether they were "so unnecessarily suggestive and conductive to irreparable mistaken identification that he (Robinson) was denied due process of law" (See *Stovall* v. *Deno,* 388 U.S. 239 (1967), at 301-302).

However, the argument reflects a gross misconstruction of the lower court's legal analysis; indeed it is flatly confuted by portions of the decision.

At the outset of his legal analysis, Judge Cooper unequivocally asserted that the issue of the force of the post-arrest taints would necessarily be considered in the very terms which petitioner now asserts were not applied:

> "[1, 2] The issue before us is whether the pre-trial identification process set forth above should have precluded Voltaggio's in-court identification of petitioner. Whereas here the illegality of the pre-trial identification procedure is already established because petitioner was deprived of his right to counsel, *the State bears the burden of establishing by clear and convincing evidence that the in-court identification was based upon observations of the suspect other than during pre-trial identification procedures; that the in-court identification had an independent origin and was not tainted by the prior illegal procedures. United States* v. *Wade,* 388 U.S. 218, 240-241, 87 S. Ct. 1926, 18 L.Ed. 2d 1149 (1967)." (371 F. Supp. at 415-416, emphasis added)•

In his subsequent evaluation of the evidence, Judge Cooper again and again returned to the standard which we have just cited. Thus, in summarizing the evidence on the at-the-scene viewing (the independent basis evidence), Judge Cooper noted:

> "We conclude, therefore, that the Government produced *clear and convincing* evidence of a source for the in-court identification." (371 F. Supp. at 418, emphasis added)

• Petitioner also asserts that the District Court tested the evidence herein only by the "fair preponderance of the evidence" standard. However, the quote, *supra,* and the ones which follow underline the absurdity of this argument; in fact, the "fair preponderance" test is only alluded to once by Judge Cooper (371 F. Supp. at 415) and then merely as a measure for determining the credibility of conflicting portions of the testimony of Voltaggio and Robinson regarding the pertinent identification procedures.

Subsequently, having reviewed the evidence on the post-arrest taints, the court once again asserted:

> "In the instant case the record is *clear* that Voltaggio's identification was *unwavering* and based upon adequate visual observation at the scene of the crime." (371 F. Supp. at 409, emphasis added; 'unwavering' is plainly synonymous with 'convincing')

Finally, having taken stock of case law that was allegedly favorable to petitioner [e.g. *Kimbrough* v. *Cox*, 444 F. 2d 8 (4th Cir. 1971)], the court stated:

> "That description (e.g. of Voltaggio) was accurate and sufficiently detailed to demonstrate that Voltaggio's in-court identification was based upon his observation at the scene of the crime and was not derived from the confrontation at the showup." (371 F. Supp. at 423)

Although it is true, as petitioner has taken elaborate care to note, that the "irreparable misidentification" *Stovall* standard is cited several times in the discussion of the alleged taints (*viz.*, 371 F. Supp. at 419-421), Judge Cooper was merely addressing himself to a point raised but not reached in the Circuit Court's earlier consideration of this case—the question of whether the improper procedures, and, in particular, the showup created a *per se* violation of due process, irrespective of the independent basis for the identification (468 F. 2d at 163). Judge Cooper, for good cause, found that they did not.* His reasoning on

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* The District Court found that the arrest hearing and station-house identification both took place within a very short time of the crime and thus could not be held to have overridden Voltaggio's definite, initial impression of Robinson (371 F.Supp. at 420). As for the photographic array, this merely served to make Voltaggio part of an ongoing police investigation. It was not intended to refresh Voltaggio's initial recollection of Robinson (371 F.Supp. at 421).

this point is merely a corollary of his broader conclusion that, on the sum total of the evidence, there is a clear and convincing independent basis for Voltaggio's identification.

D. The Testimony Concerning the Pretrial Identification Procedure is at Most Harmless Error.

Petitioner also asserts that the inclusion of a reference in Voltaggio's trial testimony to the pretrial identification procedure created irreparable prejudice to him. The short answer to this claim, as noted by the Circuit Court, is that since it was never raised before, during or after the District Court hearing, it cannot now be raised here. *United States ex rel. Springle* v. *Follette,* 433 F. 2d 1380 (2d Cir. 1970), *cert. den.* 401 U.S. 980 (1971), *United States ex rel. Fein* v. *Deegan,* 410 F. 2d 13 (2d Cir. 1969), *cert. den.* 395 U.S. 935 (1968).

In any event, placed in its proper context, it becomes clear that the allegedly improper reference was an all together negligible aspect of Voltaggio's testimony. In the first place, the showup is never actually referred to; secondly, the thrust of Voltaggio's objected to remarks was merely to underline the extent of his observation powers at the time of the crime: when the crime was committed Robinson had a mustache; subsequently, the mustache was shaved off. Thus, the allegedly improper reference is clearly "harmless error". See *Harrington* v. *California,* 395 U.S. 250, 254 (1969); *Chapman* v. *California,* 386 U. S. 987 (1967).

CONCLUSION

Petitioner's application for a writ of certiorari should in all respects be denied.

Respectfully submitted,

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